IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision: February 14, 2007.

Bhajan Singh Vs. State of Punjab

CORAM: Hon'ble Mr. Justice Virender Singh

Present: Mr. Bipin Ghai, Advocate, for the appellant.
Mr. B.S. Sewak, DAG, Punjab.

Virender Singh, J.

Appellant Bhajan Singh stands convicted under Section 15 of Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'the Act'), vide impugned judgment of learned Special Judge, Ferozepur dated 4th of February, 2002 and has been sentenced to undergo R.I. for ten years and to pay a fine of Rs.1.00 lac, in default thereof to further undergo R.I. for one year.

In brief the case of the prosecution is that on 12.2.1997, Inspector Gurmit Singh, the then SHO of Police Station Mallanwala (PW2) along with other police officials including ASI Bachan Singh (PW1) was on patrol duty and going from Hashmatwala to Basti Chiragdeen. When they had crossed the bridge of Hashmatwala, the police party noticed the appellant coming on a Rehra with 10 gunny bags loaded on it. He was apprehended and on enquiry he disclosed his name and the address to Inspector Gurmit Singh. A memo Ex.P1 with regard to his offer of being searched in the presence of a

Gazetted Officer or a Magistrate, was prepared which was thumb marked by him and attested by police officials. Thereafter a wireless message was sent to the police station for calling DSP. DSP Harminder Singh (PW7) reached the spot after some time and he disclosed to the appellant that was a Gazetted Officer. In his presence the gunny bags on the Rehra (10 in number) were unloaded and each of the bag was containing 35 Kgs of poppy husk. 250 grams of poppy husk was extracted as sample out of each bag and thereafter the gunny bags were sealed separately with the seal of 'GS' (for Gurmit Singh) and 'HS' (DSP Harminder Singh). Seal impression Ex.P2 was also prepared. The seal was handed over to ASI Bachan Singh. All the articles were then taken into possession vide memo Ex.P3 which was attested by DSP Harminder Singh, ASI Bachan Singh and ASI Jasbir Singh. A ruqa Ex.P6 was sent to the police station upon which formal FIR Ex.P7 was recorded. From the personal search of the appellant, a sum of Rs.85/- was recovered which was taken into possession vide separate recovery memo. The grounds of arrest vide memo Ex.P5 was prepared which was also thumb marked by the appellant and attested by aforesaid witnesses. Rough site plan Ex.P8 was prepared at the spot. On return, the case property was deposited in the police station. On 13.2.1997, the case properties were handed over to ASI Jagdish Rai for producing the same before Ilaqa Magistrate. After receipt of the report of the Chemical Examiner Ex.P1, the

investigation of the present case was completed and challan was submitted against the appellant. He was thereafter charged by the trial Court under Section 15 of the Act.

In order to strengthen its case, the prosecution has examined ASI Bachan Singh (PW1), who is a witness to the recovery. He reiterated the case of the prosecution, Inspector Gurmit Singh, the Investigating Officer (PW2) whose investigation has already been alluded to in the preceding paras, Constable Rachhpal Singh (PW3) who had tendered his affidavit Ex.P10, Constable Resham Singh (PW4) on 19.2.1997 was handed over ten samples and specimen by SHO Gurmit Singh for taking the same to the Assistant Chemical Examiner, Punjab. Consequently, he on 20.2.1997 went to deposit the samples and specimen but brought back the same with some objection. On 26.2.1997, he again obtained the samples from SHO and deposited the same with the Chemical Examiner on 27.2.1997, SI Gulzar Singh (PW5) who was handed over ten samples by Resham Singh on 21.2.1997 and he took them in his custody. On 26.2.1997 he had again handed over the said samples to constable Resham Singh for depositing the same with the Chemical Examiner, ASI Jagdish Rai (PW6) who on 13.2.1997 was given the case property for producing the same along with the accused before Ilaqa Magistrate. He stated that the case property was ordered to be kept in police Malkhana and thereafter he had handed over the same to SHO Gurmit Singh.

Report of the Chemical Examiner Ex.P-11 was also tendered into evidence.

The stand taken by the appellant as emerges from his statement recorded under Section 313 Cr.P.C. is of false implication stating that no incriminating article was recovered from his possession and he has been falsely implicated in this case by calling him from his house on 11.2.1997 in the presence of Sarpanch of the village.

In defence, the appellant has produced Mukhtiar Singh son of Arjan Singh (DW1), Jagtar Singh son of Santa Singh (DW2) and Head Constable Kuldeep Singh of Police Station Mallanwala (DW3).

After appreciating the entire case, the appellant stands convicted and sentenced as indicated herein above.

Hence this appeal.

I have heard Mr. Bipin Ghai, learned counsel for the appellant and Mr. Sewak learned Deputy Advocate General, Punjab. With their assistance I have gone through the entire record minutely.

Mr. Ghai primarily attacks the prosecution case on the point of missing of link evidence and submits that the prosecution fails on this vital flaw which alone is enough to discard the case of the prosecution in its entirety. Dwelling upon his arguments on this issue, Mr. Ghai submits that the case as set up by the prosecution is

that recovery was allegedly effected on 12.12.1997. The entire case property was deposited in the Malkhana on the same day itself and on 13.12.1997 it was produced before the Ilaqa Magistrate as stated by ASI Jagdish Rai. It was again handed over to SHO Gurmit Singh on the same day and thereafter it was handed over to Constable Resham Singh on 19.2.1997 by Gurmit Singh SHO who after preparing docket went to the office of Assistant Chemical Examiner. Since there was some objection, it was brought back and re-deposited the same with SI Gulzar Singh (PW5) who was officiating as SHO of the Police Station. Thereafter on 26.2.1997 SI Gulzar Singh handed over the samples and the seal to Resham Singh and it was then deposited with the Assistant Chemical Examiner on 27.2.1997. According to Mr. Ghai, the evidence on record is that the samples could not be deposited with the Assistant Chemical Examiner because on one or two samples the FIR number of the case was not mentioned and this shows that certain samples have already been tampered with. On the other hand, Constable Resham Singh does not utter a word that he had handed over the said samples to SI Gulzar Singh on 21.2.1997. He simply stated that he came back to the Police Station and deposited the sample with S.I. Gulzar Singh. According to Mr. Ghai, the prosecution should have proved beyond any shadow of doubt that till the samples remained with the police, there was no chance of tampering with them and the present case is not free from doubt on

this aspect. The attention of this Court has been drawn to the statement of Inspector Gurmit Singh (PW1), the Investigating Officer and Constable Resham Singh (PW4).

Mr. Ghai then submits that not only there is a flaw with regard to mishandling of the samples by the prosecution agency till they reached the hands of the Chemical Examiner but also there is another material weakness with regard to production of the case property before the Court, which also creates doubt with regard to the link evidence. He submits that the case property was produced before the Ilaqa Magistrate on 13.2.1997 through ASI Jagdish Rai (PW6) along with the appellant before Judicial Magistrate Ist Class, Zira. He had handed over the same to SHO Gurmit Singh. While referring to the application Ex.P9, drafted by Inspector Gurmit Singh and handed over to ASI Jagdish Rai, Mr. Ghai submits that there was no mention of production of ten sealed sample parcels before the Court. The perusal of the order passed on the said application does not show that even the case property was produced before the Ilaqa Magistrate. The order passed by the concerned Judge simply talks of the request for remand. This indicates that the case property was never produced before the Ilaqa Magistrate and the statement made in the Court by the two officials is contrary to the records. In the same strain Mr. Ghai submits that in his cross-examination Inspector Gurmit Singh (Investigating Officer) has also admitted that he had not mentioned in

Register No.19 if the case property was retained by him in a separate room under his lock and key. It is also not mentioned in the said register that the specimen of the seal was also handed over to the constable who had taken the samples to Assistant Chemical Examiner. From this, the learned counsel wants to develop that from all these infirmities it can very safely be said that the sample seal was not prepared at the spot and prepared subsequently before despatching the sample to the Chemical Examiner. Mr. Ghai then submits that Inspector Gurmit Singh had handed over his seal to ASI Bachan Singh who was working under him only and, therefore, this weakness also dents the case of the prosecution to a great extent.

On the basis of aforesaid infirmities, the learned counsel submits that the case of the prosecution is not free from doubt with regard to the link evidence which by itself is very vital.

Learned counsel then submits that there is no independent witness joined by the Investigating Officer and the explanation tendered by the prosecution that no one was willing to join, is not worth appealing. It was a day time recovery and non-joining of the independent witness in this situation has to be taken against the prosecution.

The learned counsel also points out certain other discrepancies in the statements of the official witnesses but mainly harps upon the flaw in the link evidence.

Learned State counsel, however, controverts the submissions advanced by Mr. Ghai submitting that the recovery was effected in the presence of a senior police official (DSP) who had also attested the memos prepared at the spot and, therefore, the prosecution case is proved to the hilt. He then submits that the contraband was recovered from the buffalo-cart used by appellant and the presumption under Sections 35 and 54 of the Act qua the conscious possession has to be drawn against him and the case of the prosecution is not to be thrown on certain infirmities with regard to the link evidence or other aspects. The appellant, thus, has no escape.

After hearing the rival contentions of the either side and going through the evidence on record and the other documents minutely, I am of the view that the prosecution has not been able to prove the charge against the appellant beyond shadow of reasonable doubt and, therefore, he deserves acquittal.

The offences under the Act are grave. Stringent provisions are provided by the statute with regard to the sentence part and before the accused is to be convicted under the Act where the minimum sentence to be imposed is ten years and a fine of Rs.1.00 lac which may also extend to 20 years or Rs.2.00 lacs, in my view, there cannot be any scope for concession to the Investigating Agency at least on vital aspects. Link evidence is certainly one of those aspects and plays a very important role in a narcotic case. The prosecution is

supposed to put forth the quality of evidence in this regard in order to prove its case beyond reasonable doubt. In the case in hand, in my considered view, the prosecution miserably fails on this vital aspect.

At the cost of repetition it may be stated here that in the instant case the recovery was effected on 12.2.1997 and the entire case property was kept by Inspector Gurmit Singh with him on the same day. It was handed over to ASI Jagdish Rai (PW6) on 13.2.1997 and was re-deposited with him (Inspector Gurmit Singh) on the same day. Thereafter, on 19.2.1997 it was handed over by Inspector Gurmit Singh to Constable Resham Singh for depositing the same with the office of Assistant Chemical Examiner but it was returned with certain objections. Those objections were not recorded in any document mentioned in this case. For the first time Resham Singh, when appeared in the court as prosecution witness stated that the objection raised was that on one or two samples FIR numbers of the case was not mentioned. This statement was made after about two years of the alleged recovery. As stated above during the investigation no document was prepared with regard to the said objection at any stage or at least upto 26.2.1997 when the samples were sent again to the Assistant Chemical Examiner. It is also evident from record that when Resham Singh brought the case property back, Gurmit Singh had already proceeded on leave and S.I. Gulzar Singh (PW5) was officiating as SHO of Police Station

Mallanwala. When he stepped into the witness-box, he does not say a word about non-mentioning of the FIR number on certain samples. He simply stated that there was some objection and, therefore, Resham Singh had deposited the ten samples with him. This all goes to show that the story of non-mentioning of the FIR numbers on certain samples has been introduced for the first time in the Court. I take this aspect yet from another angle. The objection pointed out rather indicates that the samples have been tampered with.

I am doubting the case of the prosecution with regard to the link evidence in respect of specimen seal impression also. The case set up by the prosecution is that sample seal impression chit was prepared at the spot after completing all the formalities. No doubt, the said chit bears the inscriptions of two seals viz one of Inspector Gurmit Singh having inscription 'GS' and other of DSP Harminder Singh having inscription 'HS'. What is to be seen by this Court is as to whether the same was actually prepared at the spot at the time of affixing the seals on the case property or there were chances of preparing the same subsequently at any stage. The admitted position is that Inspector Gurmit Singh was the SHO of Police Station Mallanwala and, therefore, he was not supposed to produce the case property before any other senior police official of the Police Station. He was supposed to keep the entire case property in his safe custody at least till the same was produced before the Ilaqa Magistrate.

Strangely enough he had chosen to keep the case property with him for another one week till he handed over the samples to Constable Resham Singh on 19.2.1997. He had categorically stated that he had sent the case property to the Ilaqa Magistrate through ASI Jagdish Rai. Application Ex.P-9 is also drafted by him. It has come on record that ten samples and the sample seal were not produced before Judicial Magistrate Ist Class, Zira on 13.2.1997 as is clear from cross-examination of ASI Jagdish Rai. Even otherwise a perusal of application Ex.P9 indicates that the case property was not produced before the Ilaqa Magistrate as there is no such order in this regard. Record reveals that one order was passed to the effect that 350 Kgs of poppy husk was allegedly recovered from the accused and a request for police remand was made on that ground as the prosecution agency wanted to know about the source of supply of the said poppy husk. The accused was remanded to police custody till 17.2.1997. The said order is not signed by the concerned Judge and it is mentioned that it was wrongly typed. The signed order of the same date indicates that there was a request for remand only. Therefore, it goes to show that no case property was ever produced before the Ilaqa Magistrate and the statement of ASI Jagdish Rai (PW6) or even of Inspector Gurmit Singh, the Investigating Officer in this regard is contrary to the facts on record. A specific suggestion was also given to ASI Jagdish Rai by the defence in this regard. Even if the court does not take a serious

note of this lapse, the fact remains that the samples and the seal impression chit were not produced before the Ilaqa Magistrate.

The matter does not rest here. Constable Resham Singh when appeared in the witness-box, had stated that on 26.2.1997 he had taken ten samples and the specimen impression chit Ex.P2 to the Chemical Examiner whereas Inspector Gurmit Singh in his cross-examination has categorically stated that it is not mentioned in the register if the specimen of the seal was also handed over to the constable who took the samples to the Assistant Chemical Examiner. He states that form Ex.D1 on which the report of the Assistant Chemical Examiner was received, was filled by the police while sending the samples and it was signed by Additional SHO Gulzar Singh as Inspector Gurmit Singh was on leave on 26.2.1997, the date on which the samples were handed over to Constable Resham Singh. When Gulzar Singh (PW5) stepped into the witness-box, he did not say a word that he had handed over the seal impression chit to Constable Resham Singh on 26.2.1997. No doubt, the sample impression chit (Ex.P2) is pasted on form Ex.D1 but in my view, the ambiguity which still remains is as to whether it was prepared at the spot or not. While noticing such type of lapses in the investigation being conducted in Narcotic cases, this Court has repeatedly observed that FSL Form (Form No.29) should be prepared at the spot and non-preparation of the same has been taken as a serious flaw. A latest

decision of this Court rendered in ***Bhola Singh Vs. State of Punjab*** *2005 (2) RCR (Criminal) 520,* may be read with advantage on this aspect. In the aforesaid Judgment neither the FSL form was prepared at the spot nor it was deposited with the Malkhana and this Court while acquitting the Court observed as under:-

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> In ***Emma Charlotte Eve v. Narcotic Control Bureau, 2000 (4) RCR (Criminal) 386 & Shaiffullah v. State, 49(1993) DLT 193,*** it was held that "where the seals remained with the police after use and the CFSL form was neither prepared on the spot nor deposited in the Malkhana, such circumstance would be fatal to the prosecution case". Filing of such form at the spot is a very valuable safe-guard to ensure that the seal sample is not tampered with till its analysis by the F.S.L. The CFSL form should not only be prepared and sealed by the officer making seizure at the place where the case property is seized from the accused, it should also be sealed by the S.H.O. To whom the sample and the case property is handed over and the same should accompany the sample to Chemical Examiner. The idea behind taking such a precaution is to complete the material link in the prosecution evidence by eliminating the possibility of the sample being tampered with. The prosecution has miserably failed to prove the link evidence."

May be the recovery allegedly effected in this case was shown to be in the presence of a senior police official (DSP Harminder Singh) but the said fact by itself would not advance the

case of the prosecution where it fails on the basis of the aforesaid vital flaw in the link evidence which alone is sufficient to discard the case of the prosecution in its entirety.

I do not feel the necessity of discussing the other weaknesses of the prosecution case for the reason that the aforesaid solitary basic infirmity, in my considered view, is sufficient to extend benefit of doubt towards the appellant observing that the case of the prosecution is not proved to the hilt.

The net result is that the instant appeal stands allowed and the impugned judgment of conviction and sentence dated 4.2.2002, passed by Special Judge, Ferozepur, is set aside. The appellant stands acquitted of the charge. He is stated to be in custody and shall now be released forthwith if not required in any other case.

(Virender Singh)
Judge

February 14, 2007.
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